Supreme Court, U.S.
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No. 87-102

In The
Supreme Court of the United States
October Term, 1987

FIRST AFFILIATED SECURITIES, INC.,
a California corporation, *et al.*,

Petitioners,

v.

MARY LOU SULLIVAN, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court review the decision of the Ninth Circuit remanding this purely state-law case to state court, where

(1) the decision is correct under a long and unbroken line of decisions of this Court recognizing a right to maintain parallel state and federal actions;

(2) the result is dictated by the well-pleaded complaint rule which has been recognized by this Court for over a century; and

(3) there is no conflict among the Circuits in the result which would have been reached under the facts of this case.

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STATEMENT OF THE CASE

This action is one of five related cases, four of which were filed in California Superior Court and one in federal court, involving overlapping parties. The litigation began in mid-1984 when petitioner First Affiliated Securities, Inc. ("FAS"), a brokerage firm with offices in Santa Rosa, California, brought three actions in the Superior Court of California for Sonoma County. In those actions, FAS sought to recover deficits in the margin accounts of Mary Lou Sullivan, Kenneth Martin, and Malm Metal Products, Inc. (three of the respondents here) that resulted from massive losses from investments in the stock of Midwestern Companies ("Midwestern"). In late 1984, the three investors responded by filing cross-complaints against FAS and its broker, Larry Gibson, also in Sonoma County Superior Court. (Appendix ("App.") I to Petition ("Pet") at A-5 and n.1)

The events underlying the Sullivan, Martin and Malm cross-complaints involved more victims than just Sullivan, Martin and Malm, and more defendants than just FAS and Gibson.[1] Consequently, in February 1985, the 34 respon-

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[1] The facts underlying the litigation occurred in two different spheres, California and Missouri. The California sphere involved the conduct of defendants FAS and its broker, Gibson, in touting Midwestern stock in Santa Rosa, California. These California defendants made misrepresentations involving both publicly disseminated data, such as inflated sales and earnings figures, and false, purportedly "inside" information, such as misrepresentations regarding "imminent" mergers which never took place. In addition, defendants FAS and Gibson engaged in substantial unauthorized trading and made material misrepresentations regarding margin requirements. Initially, the California defendants

(Continued on following page)

dents joined to file the instant complaint in Sonoma County, anticipating that all of the Sonoma County actions (theirs and the three suits filed by FAS) would be consolidated for trial in Sonoma County Superior Court. (App. I at A-5) The respondents' state-court complaint stated no cause of action based upon federal law. (App. I at A-9) Because most of the respondents and several of the petitioners were citizens of California, federal diversity jurisdiction did not exist.

Meanwhile, other investors in Midwestern had already brought three federal securities class actions against Midwestern officers and related parties. Those class actions were consolidated in the United States District Court for the Western District of Missouri. (App. I at A-5) Respondents have opted out of the consolidated class actions,

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(Continued from previous page)

made misrepresentations to generate sales. Later, the misconduct occurred as part of a conspiracy to lend artificial support to the price of Midwestern shares so as to forestall a collapse in the market for Midwestern, with attendant losses to FAS and the Midwestern insiders. With respect to the California aspect of the case, virtually all of the transactions, evidence, and witnesses, including 32 respondents, are located in the Santa Rosa, California area.

The Missouri sphere of the case involves publicly disseminated misrepresentations by the officers, directors, attorneys and accountants of Midwestern, whose headquarters were in Missouri prior to Midwestern's bankruptcy. Respondents' complaint alleges that Midwestern, which had been a shelf corporation, was re-activated to engage in a sophisticated and nationwide stock promotion fraud. The SEC has obtained a consent decree from Midwestern, and three securities class actions against Midwestern's insiders, attorneys and accountants involving the publicly disseminated misrepresentations have been transferred and consolidated in the United States District Court for the Western District of Missouri (Kansas City).

because the class actions did not involve (1) petitioner FAS, (2) misrepresentations by brokers, (3) unauthorized trading, (4) false purported "inside" information, or (5) misrepresentations about margin requirements, all of which are at the heart of the California aspect of this case.

In March 1985, a month after filing their state-court complaint, respondents filed an action in the United States District Court for the Northern District of California, alleging substantially the same facts but asserting claims under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, and the Racketeer Influenced and Corrupt Organizations statutes, 18 U.S.C. §§ 1961-1968 (App. I at A-5); they later amended the complaint to add a claim under the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*

Respondents brought the federal action to avoid duplicative discovery by using discovery from the Missouri litigation in the state action, and to protect against the possibility that the state court would lack personal jurisdiction over the non-resident petitioners. (App. I at A-5 n.2) Respondents intended to prosecute the federal action only in the event that the California court could not exercise personal jurisdiction over all major defendants. If California jurisdiction is upheld, respondents plan to proceed to trial in state court and to dismiss the federal complaint.

On June 14, 1985, petitioners removed this action from the California Superior Court to federal court. Because diversity among the parties was lacking, petitioners asserted federal-question jurisdiction as their basis for removal despite the fact that the complaint alleged purely state-law causes of action: petitioners argued that "though

couched in terms of state law, the facts alleged in the state complaint raise essentially federal law claims."

On July 1, 1985, respondents moved to remand the case under 28 U.S.C. § 1447(c), asserting that the state-court complaint did not arise under federal law. On August 26, 1985, the District Court denied respondents' motion to remand, accepting petitioners' invocation of the "artful pleading" doctrine. (App. II at A-19 to -23) The court simultaneously granted petitioners' motions to transfer the state and federal actions to the Western District of Missouri. (*Id.*) The three lawsuits begun by FAS against three of the respondents remain pending in Sonoma Superior Court.

After denying remand of the state-law case to Superior Court, the District Court denied a motion for reconsideration but certified the jurisdictional issue for interlocutory appeal to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). (App. IV at A-25 to -26) On December 27, 1985, the Court of Appeals for the Ninth Circuit granted leave for respondents to file an interlocutory appeal. On April 1, 1987, the Ninth Circuit reversed the denial of the motion to remand the case; it remanded the case to the District Court for remand to Sonoma Superior Court. (App. I at A-1 to -18) On June 10, 1987, the Ninth Circuit unanimously denied a petition for rehearing and a suggestion for rehearing *en banc*. (App. III at A-24) Petitioners now seek a writ of certiorari from this Court.

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SUMMARY OF ARGUMENT

There is nothing new about having two parallel cases work their way through federal and state courts at the same time. When respondents (plaintiffs below) filed separate state and federal actions, with the state-court complaint limited to state-law claims and the federal complaint asserting only federal claims, both state and federal courts were empowered to proceed until one court reached a judgment that could form the basis of a *res judicata* defense in the other.

Petitioners suggested in the Court of Appeals a bizarre new theory of "pendent case" jurisdiction, by which they claim to be able to remove a case that contains no federal ingredient and does not involve diverse parties merely because a parallel, purely federal-law action was filed in federal court a month after the state-court complaint was filed. Alternatively, petitioners asserted that respondents had "artfully pled" federal claims as state-law claims, even though (1) respondents had pressed their federal claims separately, in federal court, and did not avoid federal law; (2) none of the state-law claims were pre-empted by federal law; (3) no federal judgment barred litigation of related state-law claims; and (4) respondents' state-law claims had no essential and necessary federal ingredient.

The Court of Appeals was correct in rejecting petitioners' startling revision of long-standing jurisdictional rules. Motivating forces for such a revision—the imagined problems arising from parallel litigation—are a consequence of the dual judicial system created by the Consti-

tution, and they are already remedied by existing doctrines and procedures.

There is no reason for this Court to prevent parallel litigation by disturbing the balance of federal and state court power and the constitutional design of overlapping and parallel jurisdictions. Nor is there any justification for altering the well-pleaded complaint rule which would result in federal jurisdiction in this case *only* if respondents' state-law securities claims were *necessarily* federal.

Petitioners' argument that the Ninth Circuit's decision "renders *Moitie* removal purposeless" is peculiar in light of the fact that *Moitie* itself evidenced no purpose of this Court to authorize removal in this case. Moreover, petitioners' criticism of the Ninth Circuit for expanding the "artful pleading" doctrine to allow federal jurisdiction on the ground not only of pre-emption but also of *res judicata* is irrelevant. Even under the Ninth Circuit's expanded view of artful pleading, there is no basis for removal of this case, which involves neither pre-emption nor *res judicata*.

The decisions of the Second and Fifth Circuits reinforce the decision of the Ninth Circuit in this case. *All three Courts of Appeals overturned removal in the cases cited by petitioners. The Second and Fifth Circuits would have joined the Ninth Circuit in overturning removal in this case.* There are subtle differences in rationale among the Courts of Appeals, but the decisions are not in conflict with respect to this case. Any effort by this Court to harmonize those subtle differences would merely be an academic exercise without any effect on the result in this case.

REASONS FOR DENYING THE WRIT

I. PARALLEL LITIGATION IN FEDERAL AND STATE COURTS IS A FEATURE, LONG RECOGNIZED BY THIS COURT, OF OUR DUAL COURT SYSTEM.

A. This Court Has Frequently Upheld The Right Of A Party To Conduct Parallel Litigation.

Petitioners hope to establish a rule that a complaint filed in state court with only state-law claims, well pleaded by itself, becomes "artfully" pleaded when a later federal action with only federal claims is instituted. According to petitioners' theory, the subsequent filing of the federal complaint federalizes the earlier state complaint, making it subject to removal to federal court.

Petitioners' proposal flies in the face of our federal system and this Court's decisions. The unique nature of our federal system, with state courts of general jurisdiction and federal courts of limited jurisdiction, creates an opportunity for concurrent proceedings in the separate systems that has long been recognized by this Court. In *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), the Court considered circumstances in which state and federal cases presented substantially the same issues and sought *in personam* relief. The Court observed:

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* [sic] by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any

> other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

260 U.S. at 230. *See also Princess Lida v. Thompson,* 305 U.S. 456, 466 (1939).

In *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970), the Court explained concurrent jurisdiction of federal and state courts when parallel lawsuits were filed. The Court stated:

> Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense as well. *While the railroad could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state courts.* Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. *In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.*

398 U.S. at 295 (citations omitted; emphasis added).

In *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 106 S.Ct. 768 (1986), this Court reversed a decision of the Eleventh Circuit that had upheld an injunction of state court proceedings in order to protect a federal judgment. The Court stated:

> The Court of Appeals also felt that the District Court's injunction would discourage inefficient simultaneous litigation in state and federal courts on the same issue . . . . *But this is one of the costs of our dual court system* . . . .

474 U.S. at —, 106 S.Ct. at 772 (emphasis added). The Court then quoted from *Atlantic Coast Line* the language (quoted *supra* at 8) concerning the right of a party to pursue claims simultaneously in both courts. *Parsons Steel,* 474 U.S. at —, 106 S.Ct. at 772 (quoting *Atlantic Coast Line,* 398 U.S. at 295).

In *Pennzoil Co. v. Texaco, Inc.,* — U.S. —, 107 S.Ct. 1519 (1987), this Court most recently addressed varying doctrines of abstention in light of Texaco's federal challenge to Texas judicial proceedings. The Court observed that the abstention doctrines are "designed to soften the tensions inherent in a *system that contemplates parallel judicial processes.*" — U.S. at —, n.9, 107 S.Ct. at 1526, n.9 (emphasis added). Indeed, under the abstention doctrine recognized in *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941), parallel litigation in state and federal courts, with a stay of the federal proceedings, has been *required* by this Court. *See England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 424 (1964).

B. Numerous Remedies Already Exist To Alleviate Any Problems Of Parallel Litigation, And No New Species Of Federal "Pendent Case" Jurisdiction Need Be Created To Solve Those Problems.

Because our constitutional structure of a dual judicial system makes parallel litigation possible, courts have de-

vised doctrines and methods for remedying problems[2] of multiple litigation without dong violence to the balance of federal-state power.

Foremost among the doctrines limiting the dangers of parallel litigation is *res judicata;* and this Court, in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), upheld that doctrine in the face of an attempt by the Court of Appeals for the Ninth Circuit to weaken it in particular circumstances. This Court has often recognized that *res judicata* ultimately resolves any problem of multiple litigation. *See, e.g., Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. —, —, 106 S.Ct. 768, 772-773 (1986); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970).

Another such doctrine is abstention. *See Pennzoil Co. v. Texaco, Inc.,* — U.S. —, 107 S.Ct. 1519 (1987); *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976).

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[2] In any event, the "problems" of parallel litigation are frequently exaggerated. Manual for Complex Litigation Second § 31.31 (1985) notes *advantages* to the filing of simultaneous claims in state and federal courts, including the availability of federal discovery procedures:

> The fact that the courts have different procedures is sometimes an advantage. For example, the existence of state court procedures for interlocutory appeals may provide a means for obtaining an early appellate ruling on a critical issue of state law, *while the federal procedures may permit discovery to be conducted in a more expeditious and efficient manner.*

(Emphasis added.) Respondents filed parallel lawsuits precisely to achieve greater flexibility and efficiency in litigation. As individual investors suing institutional parties such as a Big Eight accounting firm and a national brokerage firm, they had no desire to create additional burdens on themselves.

Finally, in extreme cases the federal court may, to protect its own jurisdiction, enjoin state court proceedings before they reach judgment. *See Parsons Steel,* 474 U.S. at —, 106 S.Ct. at 771.

II. THE WELL-PLEADED COMPLAINT RULE, RECOGNIZED BY THIS COURT FOR OVER A CENTURY, REQUIRES REMAND OF THIS STATE-LAW CASE.

Petitioners base their entire argument upon a solitary footnote in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 397 n.2 (1981). If petitioners are correct that *Moitie* provides some authority for removal in this case, then *Moitie* overruled or modified the well-pleaded complaint rule. Examination of this Court's decisions before and after *Moitie,* however, shows that *Moitie* had no such effect.

Petitioners have been unable to articulate any rule that *Moitie* stands for—or they have been unwilling to state explicitly what they want it to stand for, namely that a purely state-law action in state court is "federalized" and made removable merely by the filing of a related federal action, because the absurdity of such a rule would be manifest. Study of *Moitie* itself, as shown below at 14, reveals that it formulated no general principle of jurisdiction that would apply to this case.

A. Earlier Decisions.

Numerous cases have established and recognized the well-pleaded complaint rule as a cardinal principle of federal jurisdiction. In *Tennessee v. Union & Planters' Bank,* 152 U.S. 454 (1894), the Court compared the effect of the Act of March 3, 1887, ch. 373, 24 Stat. 552, as amended by

Act of August 13, 1888, ch. 866, 25 Stat. 434, with the Act of March 3, 1875, ch. 137, 18 Stat. 470. Quoting cases decided under the 1875 Act, the Court stated:

> "[T]he question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party." *Central Railroad v. Mills,* 113 U.S. 249, 257 [(1885)].

Union & Planters' Bank, 152 U.S. at 460. Noting that the 1887-88 Acts restricted federal jurisdiction to a narrower scope than the 1875 Act, the Court observed:

> The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit [now District] Courts of the United States.

Id. at 462. *See also Louisville & Nashville Railroad Co. v. Mottley,* 211 U.S. 149 (1908); *Shulthis v. McDougal,* 225 U.S. 561, 569 (1912).

In *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913), Justice Holmes stated:

> Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a "suit arising under" the . . . law of the United States by his declaration or bill.

In *Healy v. Sea Gull Specialty Co.,* 237 U.S. 479, 480 (1915), he further explained that "[*t*]*he plaintiff is absolute master of what jurisdiction he will appeal to. . . .*" (Emphasis added.)

In *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936), Justice Cardozo explained "arising under" jurisdiction at some length:

> How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. *To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.* . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and *the controversy must be disclosed upon the face of the complaint*, unaided by the answer or by the petition for removal.

299 U.S. at 112-113 (emphasis added; citations omitted). The Court applied its reasoning to the case before it and observed:

> The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

299 U.S. at 117.

In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), the Court reinforced the earlier decisions described above. The Court noted in particular that "*a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.*" 339 U.S. at 672 (quoting *Tennessee v. Union & Planters' Bank*, 152 U.S. at 464) (emphasis added).

In *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (per curiam), the Court repeated the *Gully* rule that, to sustain federal jurisdiction, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

These decisions show that the respondents' complaint does not arise under the federal law: (1) respondents have invoked the jurisdiction of only California courts for determination of their state-law claims; (2) they do not assert a federal right in their state-court complaint; (3) there is no *necessary* federal element to their state-law claims; (4) the suggestion of petitioners that respondents will or may set up a federal claim, or indeed that they have asserted a federal claim elsewhere, is ineffective to create federal jurisdiction; and (5) federal law "lurking in the background"—lurking, indeed, over at the federal courthouse—is unavailing to extinguish state-court jurisdiction over respondents' state-law case.

B. Federated Department Stores, Inc. v. Moitie.

Petitioners base their entire justification for removal upon a footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), but they have been unable to extract from that footnote any statement of general principle that the Court intended should apply in other cases. Unable to discern a rule established by *Moitie*, and unwilling to address the facts of that case (which turned upon a federal judgment and *res judicata*, not present here), petitioners simply take pot shots at the Ninth Circuit's interpretation of *Moitie*. The reason for petitioners'

inability to state what *Moitie* stands for is simply that *Moitie* stands for no jurisdictional proposition. As the Court stated in *Moitie,* "The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of *res judicata.*" 452 U.S. at 395.

The majority did not address jurisdiction in the text of its opinion. It relegated to a footnote its observation that "at least some of the claims had a sufficient federal character to support removal." 452 U.S. at 397 n.2. The Court did not explain what claims were federal or what factors caused them to be federal. It simply referred to a factual finding of the District Corut regarding the plaintiffs' "essentially federal law claims" and concluded: "We will not question here that facutal finding." *Id.*

The Court's refusal to "question" the conclusion that the plaintiffs had pleaded "essentially federal law claims" might have been ambiguous if it were not for Justice Blackmun's concurring opinion. Justice Blackmun revealed that the respondents had not cross-petitioned from the part of the decision of the Court of Appeals that upheld removal jurisdiction. 452 U.S. at 404. Thus, the Court did not face the issue of jurisdiction of the courts below, and the statement "we will not question" was equivalent to "we need not address."[3]

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[3] The failure of the Supreme Court to address the question of jurisdiction matches the treatment of jurisdiction by the Court of Appeals in *Moitie.* As the Ninth Circuit stated, "The parties have devoted their briefs and oral arguments to the removal issue. They have not briefed the *res judicata* question, even after invitation to do so." *Moitie v. Fed-*

(Continued on following page)

This Court has never cited *Moitie* for any proposition concerning jurisdiction in over six years since that decision was rendered. The Court has repeated, however, its rule that "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)). This rule, this Court's treatment of jurisdiction in *Moitie*, and the Court's failure ever to rely upon the decision for jurisdictional analysis all point to one conclusion: *Moitie* simply has no precedential value on the jurisdictional issue in this case.[4]

C. Recent Decisions.

The decisions of this court after *Moitie* show that the well-pleaded complaint rule was not overruled or altered by that decision. They also demonstrate the correctness of the Ninth Circuit's result in this case.

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erated Department Stores, Inc., 611 F.2d 1267, 1268 n.2 (9th Cir. 1980). The Court of Appeals accorded one short paragraph to the jurisdiction question; concluded it with a statement that "[i]n light of our disposition of this appeal, appellants [who challenged federal jurisdiction] will not quarrel with the result"; and devoted the remainder of the opinion to the *res judicata* issue. *See* 611 F.2d at 1268, 1269-70.

[4] In light of this conclusion, petitioners' argument that the Ninth Circuit decision "renders *Moitie* removal purposeless" is exposed as proving too much: *Moitie was purposeless with regard to removal.* It was simply—as the Court itself made clear—a *res judicata* decision

In *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983), this Court ordered remand to state court of a case brought by California state tax authorities to levy upon ERISA plan funds to collect state taxes. The Court discussed long-standing principles marking the boundaries of federal removal jurisdiction:

> The jurisdictional structure at issue in this case has remained basically unchanged for the past century. . . . For this case—as for many cases where there is no diversity of citizenship between the parties—*the propriety of removal turns on whether the case falls within the original "federal question" jurisdiction of the United States district courts* . . . .

463 U.S. at 7-8 (emphasis added). This Court highlighted the well-pleaded complaint rule as a "powerful doctrine,"

> which as a practical matter severely limits the number of cases in which state law "creates the cause of action" that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.

463 U.S. 9-10. The Court continued:

> For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law. "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112 (1936).

Franchise Tax Board, 463 U.S. at 10-11 (emphasis in original). The Court quoted *Gully* to the effect that federal law "lurking in the background" is "unavailing to

extinguish the jurisdiction of the states." *Franchise Tax Board,* 463 U.S. at 12 (quoting *Gully,* 299 U.S. at 117).

The Court recognized that "arising under" jurisdiction could exist either (1) because federal law creates the cause of action asserted by a plaintiff or (2) because federal law unavoidably controls the case. The Court noted:

> Although we have often repeated that "the party who brings a suit is master to decide what law he will rely upon," *The Fair v. Kohler Die and Specialty Co.,* 228 U.S. 22, 25 (1913), it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint, see *Avco Corp. v. Aero Lodge No. 735, Int'l. Assn. of Machinists,* 376 F.2d 337, 339-340 (CA6 1967), aff'd, 390 U.S. 557 (1968).

Franchise Tax Board, 463 U.S. at 22. This Court then examined how strong a "necessity" was required for a state-law claim to present "necessary federal questions" under *Gully* that would support federal jurisdiction and removal of a case from state court. Regarding *Avco,* the Court stated:

> The necessary ground of decision was that the preemptive force of § 301 [of the Labor Management Relations Act of 1947, 29 U.S.C. § 185] *is so powerful as to displace entirely any state cause of action* "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the

> scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Board, 463 U.S. at 23-24 (emphasis added; footnote omitted). The Court summarized its long line of precedent at the conclusion of its opinion by stating:

> Our concern in this case is consistent application of a system of statutes conferring original federal-court jurisdiction, as they have been interpreted by this Court over many years. Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

463 U.S. at 27-28.

Like the improperly removed state-law action at issue in *Franchise Tax Board,* this case neither relies upon any cause of action created by federal law nor necessarily depends upon resolution of any federal law. Accordingly, the Court of Appeals for the Ninth Circuit was correct in reversing the district court's refusal to remand the case.

In *Merrell Dow Pharmaceuticals Inc. v. Thompson,* — U.S. —, 106 S.Ct. 3229 (1986), this Court analyzed the limits of federal "arising under" jurisdiction. The Court stated: "we have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." — U.S. at —, 106 S.Ct. at 3233. This Court once again discussed the "need for prudence and restraint in the jurisdictional inquiry." — U.S. at —, 106 S.Ct. at 3234 (citing *Franchise Tax Board,* 463 U.S. at 20).

Acknowledging that there was no "single, precise definition" of "federal question" jurisdiction of the federal courts, the Court discussed two categories of cases falling within that jurisdiction as identified earlier in *Franchise Tax Board*. *See supra* at 18. First, the Court observed that

> [t]he "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a " 'suit arises under the law that creates the cause of action.' " Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.

Merrell Dow, — U.S. at —, 106 S.Ct. at 3232-3233 (citations omitted). The Court recognized a well-established line of Supreme Court precedent that allows a party to select the causes of action asserted in a complaint:

> Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. See *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480, 35 S.Ct. 658, 659, 59 L.Ed. 1056 (1915) ("[T]he plaintiff is absolute master of what jurisdiction he will appeal to"); *The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon").

Merrell Dow, — U.S. at —, n.6, 106 S.Ct. at 3233 n.6.

Second, this Court observed: "we have, however, also noted that a case may arise under federal law 'where the vindication of a right under state law *necessarily turned* on some construction of federal law.' " — U.S. at —, 106 S.Ct. at 3233 (quoting *Franchise Tax Board*, 463 U.S. at 9) (emphasis added). The Court quoted, with implicit ap-

proval, the explanation of the Court of Appeals in that same case concerning the "necessary" federal character of state-law claims in this second category of cases:

> Federal question jurisdiction would . . . exist only if plaintiffs' right to relief *depended necessarily* on a substantial question of federal law. . . . Because the jury could find negligence on the part of Merrell Dow without finding a violation of the [Federal Food, Drug and Cosmetic Act], the plaintiffs' causes of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court.

Merrell Dow, — U.S. at —, 106 S.Ct. at 3232 (quoting 766 F.2d 1005, 1006 (6th Cir 1985)) (emphasis in original).

In this case, application of the rules and principles of *Merrell Dow* and the precedent of this Court relied upon in that decision requires a finding that respondents' state-court suit also was improperly removed. Respondents here chose not to advance federal-law theories in their state-court complaint. Thus this case does not fall within the first category of "arising under" jurisdiction. In addition, nothing either in the facts underlying respondents' claims or in their pleadings brings the case within the second category of "arising under" jurisdiction in which they must *necessarily* rely upon federal law. Respondents' state-law claims exist independently of, and in addition to, any federal claims they may have, whether those claims are asserted or not.

In *Metropolitan Life Insurance Co. v. Taylor*, — U.S. —, 107 S.Ct. 1542 (1987), this Court addressed the application of the well-pleaded complaint rule to a claim for disability benefits under an ERISA plan. The Court dis-

cussed the fact that federal pre-emption in a particular area may make any civil complaint "raising this select group of claims" *necessarily* federal in character. *Id.* at —, 107 S.Ct. at 1546. The Court expressed hesitation at basing jurisdiction upon a characterization that state-law claims were necessarily federal because of pre-emption. It stated: "Even with a provision . . . that lies at the heart of a statute with the unique pre-emptive force of ERISA, however, *we would be reluctant to find that extraordinary pre-emptive power,* such as has been found with respect to § 301 of the [Labor Management Relations Act, 29 U.S.C. § 185], *that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.*" *Metropolitan Life,* — U.S. at —, 107 S.Ct. at 1547 (emphasis added). Instead, the Court found that the case arose under the laws of the United States because of an explicit Congressional direction that all suits to enforce benefit rights under ERISA plans were to be regarded as arising under the laws of the United States. — U.S. at —, 107 S.Ct. at 1547-1548. Justice Brennan, joined by Justice Marshall, concurred in the opinion, writing separately to note that "the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court." *Id.* at —; 107 S.Ct. at 1548 (emphasis in original).

In its most recent case confronting these issues, *Caterpillar Inc. v. Williams,* — U.S. —, 107 S.Ct. 2425 (1987), this Court upheld the remand of a case removed from state court. The Court discussed the history of the well-pleaded complaint rule, *id.* at — and n.7, 107 S.Ct. at 2429 and n.7; and it discussed the " 'independent corollary' to the well-

pleaded complaint rule known as the 'complete pre-emption' doctrine." *Id.* at —, 107 S.Ct. at 2430 (quoting *Franchise Tax Board,* 463 U.S. at 22). Relying upon *Metropolitan Life* and *Franchise Tax Board,* the Court stated that "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar,* — U.S. at —, 107 S.Ct. at 2430.

The Court expressly stated that *the "artful pleading" doctrine cannot be invoked on the basis of facts not alleged in the complaint. Id.* at —, 107 S.Ct. at 2432. In support of that statement, the unanimous court quoted Justice Brennan's dissenting statement in *Moitie,* 452 U.S. at 410 n.6, that *recharacterization of a plaintiff's claim as federal is correctly confined to areas of the law pre-empted by federal substantive law. Caterillar,* — U.S. at —, n.11, 107 S.Ct. at 2432, n.11.

Thus, to the extent that petitioners suggest that *Moitie* might support recharacterization of a plaintiff's complaint on the basis of matters, *other than federal pre-emption of purportedly state-law claims,* not found within that complaint, that suggestion has been soundly rejected by this unanimous Court during its most recent term. There is no reason for the Court to review the Ninth Circuit's decision here upon petitioners' strained suggestion that *Moitie* requires a different result, because all the relevant decisions since *Moitie* confirm the correctness of the Ninth Circuit's result.[5]

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[5] When they argue that the Ninth Circuit construes "artful pleading" recharacterization to apply where *res judicata*

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III. THERE IS NO CONFLICT AMONG CIRCUIT COURTS REGARDING THE PROPRIETY OF REMAND OF THIS STATE-LAW CASE.

Petitioners' argument that the decision of the Ninth Circuit conflicts with decisions of the Second and Fifth Circuits collapses upon inspection of the purportedly conflicting decisions. All three Courts of Appeals found removal improper in the cases before them, and all three would have decided this case the same way. They might have differed somewhat in their approaches, but it is an axiom that this Court "reviews judgments, not statements in opinions." *California v. Rooney*, — U.S. —, 107 S.Ct. 2852, 2854 (1987); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Because the judgments of the Second, Fifth and Ninth Circuits would have been identical in this case, the present petition does not "squarely frame[ ] the issue," *cf.* Pet. at 4, but instead proposes an exercise better suited to academic gowns than to judicial robes.

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creates a defense, petitioners unwittingly criticize the Ninth Circuit for *expanding* the artful pleading too far, by recognizing a basis of federal jurisdiction under "artful pleading" analysis other than pre-emption. The fact is that neither pre-emption nor *res judicata* applies to this case, so that, even under the expanded scope of artful pleading, respondents' state-court complaint was not removable. Moreover, petitioners' reason for asserting federal jurisdiction over the state-court case was a claim of *"lis alibi pendens"* (or "other action pending") in federal court. *That also is generally a defense. See Schwartz v. Horowitz*, 131 F.2d 506, 508-9 (2d Cir. 1942); *Hudson & Manhattan R. Co. v. United States*, 28 F. Supp. 137 (S.D.N.Y. 1939); *cf. Belcher Co. of Alabama, Inc. v. M/V Martha Mariner*, 724 F.2d 1161, 1163 (5th Cir. 1984) (*lis alibi pendens* raised as defense). Thus, by petitioners' own argument, their theory of jurisdiction fails.

Indeed, the petition remarkably fails to address the particular facts of this case anywhere in its argument. It simply engages in a theoretical and abstract dissertation which, untested by reference to any particulars of this case, is wholly unilluminating.

The Second Circuit, in *Travelers Indemnity Co. v. Sarkisian,* 794 F.2d 754 (2d Cir.), *cert. denied,* — U.S. —, 107 S.Ct. 277 (1986), looked to the *sequence* of complaints in federal and state courts as a necessary criterion in determining whether federal law claims were artfully pled. Discussing the facts presented in *Moitie,* the Second Circuit concluded that "Brown [the plantiff] had an initial opportunity to be master of his price-fixing claim and elected to assert it under the Clayton Act in federal court. Having done so and having foregone the opportunity to plead a pendent state law claim, he was not free to abuse the dual court system by *filing in state court a second lawsuit* and *resubmitting his claim* as one based solely on state law." 794 F.2d at 760-761 (emphasis added). The Second Circuit held that the state-court complaint there met the "sequence" element of artful pleading "since [Travelers' state-court] complaint was filed after Travelers had previously elected to bring a similar claim in federal court under RICO." 794 F.2d at 761.[6]

Application of the "sequence" analysis of *Travelers* to the present case would require remand to state court. Respondents (as well as petitioner FAS) filed *in state*

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[6] The Second Circuit found that, although the "sequence" element was met, the other artful pleading element—identity of the elements of the state and federal claims—was not met. As a consequence, the court ordered the state-law case remanded.

court first. That fact alone would cause the Second Circuit to reach the same result in this case as was reached by the Ninth Circuit.

Moreover, in the language quoted above, the Second Circuit emphasized that plaintiff had deliberately withheld a claim that it could have asserted, under principles of pendent jurisdiction, in its first (federal court) action. Here, respondents could not have filed their claims under the Securities Exchange Act of 1934 in their first (state court) complaint, because those claims are within the exclusive jurisdiction of federal courts. *See* 15 U.S.C. § 78aa.[7] They passed up no opportunity to assert those claims in state court.

The Fifth Circuit, in *Powers v. South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust,* 719 F.2d 760, 765 (5th Cir. 1983), found removal improper where, in her state-court complaint, "Powers alleged no federal cause of action, raised no federal issue, and relied on no federal statute." The court stated as "an initial proposition" that "the law that creates the cause of action [in *Powers'* complaint] is state law, and original federal jurisdiction is lacking unless Powers' claim falls victim to an exception to the well-pleaded complaint rule." 719 F.2d at 765. The court held that "[o]nly when the plaintiff's complaint clearly establishes that the claim is one necessarily arising under

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[7] Respondents also filed their state-court complaint before the California Supreme Court, in *Cianci v. Superior Court,* 40 Cal.3d 903, 221 Cal.Rptr. 575 (1985), held that RICO claims may be asserted in state courts. The question whether state courts have concurrent jurisdiction over RICO actions is still unsettled in federal courts.

federal law will the federal issue suffice to support removal to federal court." *Id.* at 766. Because the state-court complaint by the present respondents alleges no federal cause of action, raises no federal issue, relies on no federal statute, and states no claim that necessarily arises under federal law, the analysis of the Fifth Circuit in *Powers*, like that of the Second Circuit in *Travelers* and that of the Ninth Circuit here, would require remand of this case to state court.[8]

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[8] Petitioners raise a red herring when they attribute to the Fifth Circuit an "election," or motivation, criterion for artful pleading based on its statement (719 F.2d at 766) that "Powers has not evidenced a desire to proceed under federal law; rather, she has consistently and vociferously attempted to avail herself of the state forum and relief to which she asserts entitlement." First, the statement evidently concerns Powers' state-court *complaint*, which was carefully limited to state law; the Fifth Circuit acknowledged that Powers had also filed a parallel federal action. 719 F.2d at 766 n.5.

Second, the Fifth Circuit explained the crucial differences between *Moitie* and Powers' action. In *Moitie*, the plaintiffs attempted to evade a valid federal court *judgment* that should have barred their second suit. In *Powers*, there had been no judgment in any court. As the Fifth Circuit explained, moreover, "that her federal suit evidently alleges violations of ERISA based on the same set of circumstances involved in the instant case does not bring her within *Moitie*, however, because her federal suit is merely a *tactical maneuver, instituted after her state court filing, to protect herself*. This is clearly and substantially different from the situation presented in *Moitie*." 719 F.2d at 766 n.5. This explanation shows that respondents also fall outside the scope of *Moitie*: respondents' federal action was likewise instituted *after their state-court filing* and was likewise filed for tactical and protective purposes, namely to safeguard against potential difficulties establishing personal jurisdiction over some defendants in Californa state court and to enjoy economy and efficiency of discovery procedures by riding the coattails of related consolidated federal class actions.

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CONCLUSION

Because the Ninth Circuit's decision ordering remand of this purely state-law case to state court rests firmly upon the constitutional design of a dual court system with overlapping jurisdictions, because the decision is consistent with a century of this Court's "arising under" analysis, and because the decision would have been no different in any other Court of Appeals, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Third, the discussion of plaintiff's intentions in *Powers* was merely *dictum* because the holding of the decision was that "a defense of federal preemption of state law claims does not suffice to bring a case within the original [and, therefore, removal] jurisdiction of the federal courts." 719 F.2d at 767. Thus, under any analysis of the holding and the reasoning of *Powers* (as opposed to a textual snippet taken out of context), it is clear that the Fifth Circuit would not differ from the Ninth Circuit in deciding to order remand of the respondents' state-court action.